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Name: Emil J. Kiehne**JUDICIAL SELECTION COMMISSION****Application for Judicial Vacancy on the New Mexico Court of Appeals
(Vacancy created by Judge Wechsler's retirement)****APPLICATION****PERSONAL**

1. Full Name	Emil John Kiehne			
2. County of Residence	Valencia County			
3. Birthplace	Silver City, New Mexico			
4. If born outside the US, give the basis for your citizenship	n/a			
5. Birth Date	April 16, [REDACTED]			
6. Marital Status	Married			
7. If married, list spouse's full name	Laurie Anne Mellema Kiehne			
8. Spouse's occupation	Homemaker and teacher			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: My uncle, James H. Reynolds, is a lawyer in Silver City, and I would recuse myself from any of his cases.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
November 2006 - present	241 Pueblo Lane	Los Lunas	NM	87031

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Los Lunas High School, Los Lunas, New Mexico, diploma, 1990.
College(s)	Harvard College, Cambridge, Massachusetts, A.B. cum laude in History, 1995.
	Goethe Institut, Iserlohn & Prien am Chiemsee, Germany (studied German from September through November 1992).
	Universidad de Navarra, Pamplona, Spain, Master sobresaliente cum laude in Political Philosophy, 1997.
Law School(s)	Notre Dame Law School, South Bend, Indiana, J.D. cum laude, 2000.

12. Bar Admissions and Dates	Pennsylvania, February 2001 (inactive) New Mexico, April 2004 U.S. Court of Appeals for the Third Circuit, January 2004 U.S. Court of Appeals for the Tenth Circuit, March 2005 U.S. District Court, New Mexico, 2005 U.S. District Court, Eastern District of Pennsylvania, September 2003 (inactive).
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EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	October 2004 to the present
Employer	Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Mailing Address	P.O. Box 2168, Albuquerque, New Mexico 87103
Business Phone	(505) 848-1800
Position	Partner/Shareholder
Duties	My primary duties are to advise clients on their rights and responsibilities under the law, and to represent them in lawsuits and before administrative agencies. Within my firm, my duties include the supervision of both associate lawyers and our support staff.
Supervisor	I don't have a supervisor, but the president of the firm is Walter E. Stern.

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	September 2003 – September 2004
Employer	Fox Rothschild LLP (law firm)
Mailing Address	2000 Market Street, 20th Floor, Philadelphia, Pennsylvania 19103-3222
Business Phone	(215) 299-2000
Business FAX	(215) 299-2150
Employer's Email Address	My supervisor was Scott Vernick, and his email address is svernick@foxrothschild.com .
Position	Litigation associate. My duties included answering clients' questions; conducting legal research; analyzing complex legal issues; writing arguments in briefs; and questioning witnesses at depositions.

Dates of Employment	August 2000 to August 2003
Employer	Philadelphia District Attorney's Office
Mailing Address	Present address: Three South Penn Square, Philadelphia, Pennsylvania 19107. When I worked there, the office was located at 1421 Arch Street.
Business Phone	(215) 686-6000
Business FAX	(215) 563-0047
Employer's Email Address	My supervisor was Hugh Burns, Chief of the Appeals Unit, and his email address is hugh.burns@phila.gov .
Position	Assistant District Attorney. I began by prosecuting misdemeanor cases and conducting preliminary hearings in the Philadelphia Municipal Court, and later moved to the Appeals Unit, where I handled numerous appeals.

Dates of Employment	January 2000 to May 2000
Employer	Don Pablo's Mexican Restaurant
Mailing Address	4160 Grape Road, Mishawaka, Indiana 46545
Business Phone	(219) 254-9395 (this was the number when I worked there, but I have learned that this restaurant has since closed).
Business FAX	Unable to locate because the restaurant has closed.
Employer's Email Address	Unable to locate because the restaurant has closed.
Position	I worked as a waiter to earn money during law school. It was a revelation to learn how hard restaurant employees work, and the multitasking that is involved in serving food and drinks.

Dates of Employment	September 1999 to December 1999
Employer	St. Joseph County Prosecuting Attorney's Office
Mailing Address	227 West Jefferson Blvd., 10th Floor, South Bend, Indiana 46601
Business Phone	(219) 235-9544
Business FAX	Unable to locate.
Employer's Email Address	Unable to locate.
Position	Legal Extern. I worked without pay at this office while attending law school. My duties were to conduct legal research to answer the prosecutors' questions about legal issues in their cases.

Dates of Employment	May 1999 to August 1999
Employer	Jones, Snead, Wertheim, Wentworth & Jaramillo, P.A. (now called Jones, Snead, Wertheim & Clifford, P.A.).
Mailing Address	P.O. Box 2228, Santa Fe, New Mexico 87504
Business Phone	(505) 982-0011
Business FAX	(505) 989-6288
Employer's Email Address	My principal supervisor was Jerry Wertheim, and his e-mail address is jerry@thejonesfirm.com.
Position	Summer Law Clerk. My primary duties were to conduct legal research and analyze legal issues arising from plaintiffs' personal injury cases, and commercial matters.

Dates of Employment	May 1998 to August 1998
Employer	United States Attorney's Office, Southern District of California
Mailing Address	880 Front Street, Room 6293, San Diego, California 92101
Business Phone	(619) 557-5610
Business FAX	(619) 546-0720
Employer's Email Address	Unable to locate.
Position	Summer Law Clerk. I worked in the Border Crimes Unit, which, as the name suggests, was responsible for prosecuting crimes involving the international border, such as drug smuggling. My primary duties were to conduct legal research and write memos answering legal questions for the federal prosecutors. I was also able to assist at and observe several jury trials.

Dates of Employment	October 1995 to July 1997 (excluding summers)
Employer	Faculty of Economics, Universidad de Navarra
Mailing Address	Facultad de Ciencias Económicas, Universidad de Navarra, 31080 Pamplona (Navarra), Spain
Business Phone	011-34-928-42-56-00
Business FAX	Unable to locate
Employer's Email Address	sececonom@unav.es
Position	Teaching Assistant. My responsibility in this job was not to teach English, but to teach economics courses in English to Spanish students who already had some command of English. I also solidified my fluency in Spanish by living in Spain for two years.

Dates of Employment	July 1996 to August 1996
Employer	Club Llambria
Mailing Address	Calle Monasterio de El Poular, 13, 28049 Madrid, Spain (Explanatory note: This club for boys operated a summer English camp in Tarragona, in northeastern Spain, and I never visited its location in Madrid).
Business Phone	011-34-917-50-86-13
Business FAX	Unable to locate.
Employer's Email Address	llambria@gmail.com
Position	I was an English teacher and counselor at a summer camp for Spanish middle school boys.

Dates of Employment	June 1995 to September 1995
Employer	Laidlaw & Company
Mailing Address	546 5th Avenue, 5th Floor, New York, NY 10036 (When I worked there, it was located at 100 Park Avenue, New York, New York 10017).
Business Phone	(212) 697-5200 (when I worked there, it was (212) 949-5400).
Business FAX	212-354-8783
Employer's Email Address	Unable to locate
Position	Summer intern at investment bank. I conducted research on companies in various industries for use by brokers in advising clients on investments.

Dates of Employment	September 1993 to May 1995
Employer	Hilles Library, Harvard University Library
Mailing Address	59 Shepard Street, Cambridge, Massachusetts 02138
Business Phone	No longer available (the university closed this library in 2005).
Business FAX	No longer available.
Employer's Email Address	No longer available.
Position	Part-time student worker. My duties included shelving books, working at the circulation desk, and binding and repairing books.

Dates of Employment	January 1993 to April 1993
Employer	Kiehne & Associates
Mailing Address	Calle Rio Elota, Culiacán, Mexico
Business Phone	Does not exist anymore.
Business FAX	Does not exist anymore.
Employer's Email Address	N/A
Position	Worked in Mexico trying to set up distribution network for my parents' now-defunct consumer products business. We did not have much financial success, but I did learn a lot of Spanish.

Dates of Employment	July 1992 to August 1992
Employer	Camp Parquelagos
Mailing Address	Madrid, Spain (Unable to locate the address, and I do not know if it still exists).
Business Phone	Unable to locate.
Business FAX	Unable to locate.
Employer's Email Address	Unable to locate.
Position	I was an English teacher and counselor at a summer camp for Spanish middle school boys.

Dates of Employment	September 1991 to May 1992
Employer	Hilles Library, Harvard University Library
Mailing Address	59 Shepard Street, Cambridge, Massachusetts 02138
Business Phone	No longer available (the university closed this library in 2005).
Business FAX	No longer available.
Employer's Email Address	No longer available.
Position	Part-time student worker. My duties included shelving books, working at the circulation desk, and binding and repairing books.

Dates of Employment	May 1991 to July 1991
Employer	U.S. Senator Jeff Bingaman
Mailing Address	703 Hart Senate Office Building, Washington, D.C. 20510
Business Phone	No longer available. This office no longer exists due to Senator Bingaman's retirement.
Business FAX	No longer available.
Employer's Email Address	No longer available.
Position	Summer intern. My duties included conducting basic research on various policy issues, and reading and answering constituent mail.

Dates of Employment	January 1991 to May 1991
Employer	Kennedy School of Government Library, Harvard University
Mailing Address	79 John F. Kennedy Street, Cambridge, Massachusetts 02138
Business Phone	(617) 495-1300
Business FAX	(617) 495-1972
Employer's Email Address	Unable to locate.

Position	Circulation desk worker. I checked out books and helped patrons with sometimes eccentric research requests.
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Dates of Employment	September 1990 to May 1991
Employer	Quincy House Dining Hall, Harvard University
Mailing Address	58 Plympton Street, Cambridge, Massachusetts 02138
Business Phone	(617) 495-7777
Business FAX	Unable to locate.
Employer's Email Address	Unable to locate.
Position	I washed dishes at a student dining hall and helped clean up the hall after dinner hours concluded. It was actually relaxing, and I loved my colleagues, who were largely immigrants from Haiti and Portugal.

Dates of Employment	During summers and school holidays from middle school through college, i.e. 1983 through 1994, I spent various periods of time, from one to five weeks at a time. I cannot recall the exact dates.
Employer	My grandparents, Emil O. Kiehne and Beverly Kiehne (both deceased), and their company, Emil Kiehne & Sons, Inc.
Mailing Address	3620 Buxton Drive, Horizon City, Texas
Business Phone	(915) 852-4814
Business FAX	(915) 852-1557
Employer's Email Address	None
Position	Ranch worker, including: rounding up cattle on horseback; building fences; constructing a 50-mile water system; hauling large rocks to use in building water tanks for the cattle; driving tractors and planting winter wheat; and other miscellaneous ranch labor at my grandparents' farm and ranch properties in Catron County, New Mexico and near El Paso, Texas.

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15: **Present Partners at Modrall Sperling**

Daniel M. Alsup
Jennifer G. Anderson
Deana M. Bennett
Susan Miller Bisong
Martha G. Brown
Stuart R. Butzier
John R. Cooney
Katherine M. Creagan
Earl E. DeBrine
Don A. DeCandia
Joan E. Drake

Spencer L. Edelman
Timothy L. Fields
Paul M. Fish
Peter L. Franklin
Marco E. Gonzáles
Stan N. Harris
Michelle A. Hernández
Timothy C. Holm
James P. Houghton
Karen L. Kahn
Zachary L. McCormick
George R. McFall
Meg L. Meister
Arthur D. Melendres
Chris P. Muirhead
Megan T. Muirhead
Brian K. Nichols
Nathan T. Nieman
Jennifer A. Noya
Maria O'Brien
James M. Parker
Roberta C. Ramo
Tiffany L. Roach Martin
Marjorie A. Rogers
Ruth M. Schifani
Lynn H. Slade
Walter E. Stern
R.E. Thompson
Douglas R. Vadnais
Alex C. Walker

Present Associates, or Of Counsel, or Contract Counsel at Modrall Sperling

Ian W. Bearden
Jennifer L. Bradfute
Sonya R. Burke
Emily P. Chase-Sosnoff
Tomás J. Garcia
Jeremy K. Harrison
Luke W. Holmen
Andrew B. Indahl
Anna E. Indahl
Robin E. James
Vanessa C. Kaczmarek
Kimberly Knox
Mia K. Lardy
Zoe E. Lees

Damon P. Martínez
Elizabeth A. Martínez
Cristina A. Mulcahy
Lesley J. Nash
Nadine E. Shea
Christina C. Sheehan
Sarah M. Stevenson

Former Partners at Modrall Sperling

Samantha M. Adams
Charles A. Armgardt
Angelo J. Artuso
Larry P. Ausherman
Douglas A. Baker
Suzanne M. Barker
Jason C. Bousliman
Eleanor K. Bratton
Duane E. Brown
Michael L. Carrico
Timothy J. DeYoung (deceased)
Dale W. Ek
Dennis J. Falk (deceased)
Judy A. Fry
Paul T. Halajian
Kenneth L. Harrigan
H. Jesse Jacobus, III
William R. Keleher
John J. Kelly
Suedeem G. Kelly
Daniel W. Long
Max J. Madrid (deceased)
Lisa Mann (deceased)
Russell D. Mann
Lorena Olmos
Bonnie J. Paisley
Debora E. Ramírez
Patrick J. Rogers
Doug G. Schneebeck (deceased)
Curtis W. Schwartz (deceased)
William C. Scott
Dan A. Sisk
Susan R. Stockstill (deceased)
Mary T. Torres
Timothy Van Valen

Past Associates, or Of Counsel, or Contract Counsel at Modrall Sperling

Chamiza Atencio-Pacheco
Barry J. Berenberg
Allison L. Biles
Julia Broggi
Jennifer A. Clements
Margaret Coffey-Pilcher
Theresa D. Copeland
Zachary R. Cormier
Frank T. Davis, Jr.
Alana M. DeYoung
Joe C. Díaz
Dahlia R. Dorman
Ethan M. H. Epstein
Mark J. Fidel
Ryan Flynn
Greg L. Gambill
Jason T. Gaskill
Sam M. Gill
Timothy E. Glasgow
Adam H. Greenwood
Cristin M. Heyns
Daniel M. Hill
Teresa L. Hock
Gbenoba N. Idah
K. Cameron Johnson
Jordan L. Kessler
Erin E. Langenwalter
Harold W. Lavender
Marte D. Lightstone
Joan D. Marsan
Meghan H. Mead
Michael B. Neill
Benjamin A. Nucci
Leslie M. Padilla
Matthew W. Park
Tonn K. Peterson
Kevin D. Pierce
Krista Pietschman
Chad R. Prososki
Rachel Reinsvold
Andrea K. Robeda
Derek T. Rollins
Jacob R. Ross
Jason J. Rudd
Sonia R. Russo

Laura E. Sánchez
Emily M. Tippetts
John J. Wheir
Sam L. Winder

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16:

I have participated in several dozen personal injury and wrongful death cases in both the trial and appellate courts, including cases involving medical malpractice, products liability, workplace accidents, and nursing home liability. The clients I have represented include individuals, such as teachers, doctors, nurses, police officers, and small business owners. I have also represented hospitals, corporations, and governmental entities, such as local public schools. Most of them have found suing, or being sued, to be a difficult and stressful process, and I have worked hard to help them understand how the legal system works, to empathize with them and calm their nerves, and to help them resolve their cases as efficiently as possible.

I have been active in all stages of these cases: advising clients on how to conform their conduct to the law; responding to lawsuits in the trial courts; gathering evidence in the discovery process; drafting motions for summary judgment, and motions to allow or exclude evidence; providing appellate support to the trial lawyers at trial; and handling the cases on appeal. In addition, I have also spent significant time negotiating settlements of lawsuits.

These cases are often complex and difficult to resolve. In medical cases, for example, deciding whether a medical provider was negligent or not can involve reviewing lengthy patient charts, and require an understanding of sophisticated medical concepts. Issues of causation can also be difficult to resolve. In nursing home cases, for example, patients are often medically compromised, and it requires a lot of work to determine whether the resident's bad outcome was caused by the nursing home or by other factors. It can take months to gather all the relevant evidence and talk to all of the witnesses.

One of the most memorable matters on which I have worked was a case in New Mexico state trial court in which my firm represented the plaintiff, a man who was horribly burned, and blinded, by an explosion at the refinery where he worked. We also represented his wife on her loss of consortium claim, because her life had also been shattered by that event. It was professionally satisfying to stand by their side and help them work through the aftermath of this catastrophe, navigate the often-stressful court system, and eventually to settle their claims before trial.

17. How extensive is your experience in Commercial Law?

Answer 17:

I have participated in dozens of commercial cases, in both the trial and appellate courts. In this area I have also been fortunate to help a wide variety of clients, from individuals to large corporations, from small, local businesses, to governmental entities. Although commercial law may sound like a cold subject, it can have as much drama and human emotion as any other area of the law. Many people have invested their

lives, money, and sweat in building businesses to support their families, and when they are involved in a dispute it can be very emotional. As always, I have seen it as my duty to provide clients in business disputes with calm, objective legal advice, and to help them resolve their disputes as fairly and quickly as possible.

My cases have involved many kinds of issues, including: banking law; business divorces; business torts (such as fraud, interference with contracts, and Unfair Practices Act claims); contract disputes; foreclosure law; garnishment; government contracts and procurement; healthcare law; Indian law; legal malpractice; partnership disputes; property disputes; tax law; trade secrets; and trademarks.

Many of my cases have involved complex business arrangements. For example, I once represented a bank in foreclosing on a residential development owned by a longtime borrower after the relationship soured. I also helped to represent a small, New Mexico business in a "bet-the-company" business torts case against a much larger corporation.

One of the most memorable commercial cases I have participated in was *Sanders v. FedEx Ground Package Sys.*, 2008-NMSC-040, 144 N.M. 449, in which I represented a small New Mexico business owner who had been treated unfairly in his contractual dealings by a large corporation. I helped to persuade our Supreme Court to reinstate a \$680,000 jury verdict in his favor.

18. How extensive is your experience in Domestic Relations Law?

Answer 18:

I have handled one appeal in the New Mexico Court of Appeals involving property division in connection with a contentious divorce. See *Estate of Nauert v. Morgan-Nauert*, 2012-NMCA-037, 274 P.3d 799.

More recently, I have provided advice to a trial lawyer on behalf of a mother involved in a contested child custody case to help her prepare the case for appeal.

19. How extensive is your experience in Juvenile Law?

Answer 19:

While a prosecutor, I handled two appeals brought by juvenile criminal defendants. In one of those cases, after reviewing the trial court record, I concluded that there was insufficient evidence to support the juvenile's adjudication of delinquency, and I conceded this in the brief I filed with the appellate court. I strongly believed, and still believe, that a prosecutor's first duty is to see that justice is done, not to win convictions at all costs.

20. How extensive is your experience in Criminal Law?

Answer 20:

I was a prosecutor for three years. The experience of helping ordinary people who were affected by crime was both difficult and rewarding. It was difficult because I was trying to help people who had terrible things happen to them and their families, and as a result they experienced a loss of their sense of security, and were often fearful of appearing in court. It was rewarding because I was able to help them understand that they were not alone, and to reassure them that my colleagues and I would do our best to see that justice was done.

As a prosecutor, I had primary responsibility for handling over 75 appeals involving all aspects of substantive and procedural criminal law, including: Fourth Amendment search and seizure issues; the Fifth Amendment, self-incrimination, and confessions; the right to counsel and ineffective assistance of counsel; statutory interpretation; jury selection and instruction issues; *Brady* and discovery issues; the Public Trial Clause; sentencing issues; state constitutional claims; post-conviction relief; excessive punishment claims; double jeopardy; conspiracy and accomplice liability; and the sufficiency of the evidence.

These appeals arose mostly from cases involving serious crimes. In fact about half of my appellate criminal cases involved homicides, but I also handled appeals in cases involving rape, robbery, aggravated assault, crimes against children, drug trafficking, and burglary.

While a prosecutor, I also conducted somewhere between 20 and 30 misdemeanor bench trials, for crimes such as driving while intoxicated, simple assault, theft, minor drug offenses, and shoplifting. I conducted approximately 40 to 50 preliminary hearings to determine whether there was sufficient evidence to try defendants for serious felonies. These hearing often also involved bail determinations. Finally, in the misdemeanor court I also conducted at least two dozen suppression hearings, which usually involved questions about whether probable cause existed to stop a suspected drunk driver, or to search a suspect for illegal drugs.

After leaving the prosecutor's office, I have also had some opportunities to represent individuals being investigated or prosecuted for alleged criminal activity. This experience has also been valuable. I have seen first-hand the emotional and financial burdens that a criminal prosecution can impose on defendants and their families, and appreciate the professionalism of criminal defense lawyers who put the government to its burden of proof and defend the rights of the accused.

While still in Philadelphia, I helped a partner in my law firm to represent two criminal defendants who entered guilty pleas to federal tax crimes. I accompanied them to their sentencing hearings, and advised them on how to comply with their conditions of release.

After returning to New Mexico, I represented a client in state district court who faced a felony charge, and obtained a reduction to a misdemeanor via motion practice. I have also been involved with advising a client in a confidential matter before a federal grand jury, and have represented a nursing home in defending a case under the federal False Claims Act, which is quasi-criminal in nature. I also advised a client's employees who were potential (and ultimately actual) witnesses in a federal criminal trial arising from an industrial accident.

I have represented clients in Section 1983 cases where issues of criminal law, such as search and seizure, wrongful arrest, and malicious prosecution, were implicated. *See Kee v. Ahlm*, 219 F. App'x 727 (10th Cir. 2007) (involving wrongful arrest and malicious prosecution claims against client police officer); *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016) (involving allegations that student was improperly searched for drugs in violation of the Fourth Amendment).

21. How extensive is your experience in Appellate Law?

Answer 21:

Working on appeals is my passion in life.

In my career, I have handled approximately 135-140 appeals, which includes both civil and criminal cases. As a prosecutor, my appeals involved upholding convictions in serious criminal cases involving a wide variety of constitutional, substantive, and procedural issues.

In my civil appeals, I have represented a wide variety of clients, including homeowners, police officers, teachers, school administrators, small business owners, borrowers, lenders, non-profit organizations, mining companies, public and private schools, hospitals, HMOs, utility companies, banks, a newspaper, a restaurant franchisee, and even a major league baseball team and one of its minor-league players.

I have advised clients on whether they *can* appeal, and if so, whether they *should* appeal. I have also advised them on the differences between appellate courts and trial courts; on their chances of success; how to stay the execution of judgments; what issues to raise; and how to present those issues to the appellate courts.

My work on appellate matters often begins in the trial court, where I help clients to prepare for an eventual appeal by ensuring that issues are raised in the appropriate way. This often involves drafting and arguing motions to dismiss, motions for summary judgment, motions to include or exclude evidence, and jury instructions.

Once a trial is over, I draft and argue post-trial motions; ensure that the appeal is properly and timely filed; and help clients to post security to stay the judgment so it is not executed against them while the appeal is pending. In the appellate courts, I ensure that a complete record of the trial proceedings is assembled; conduct extensive appellate research; draft the briefs in which my client's arguments are presented; and present oral argument to the appellate judges or justices.

While some appeals are relatively simple, many more of my cases have involved complex legal and factual issues, some of which have created new law. I have briefed and analyzed issues involving: administrative law; the Americans With Disabilities Act; appellate jurisdiction; arbitration; banking law; bankruptcy law; claims under the New Mexico Constitution; contract law; conversion; discovery sanctions; employment law; extraordinary writs; the *Erie* doctrine; the Equal Protection Clause; the First Amendment; foreclosure; fraud; Indian law; judicial estoppel; jury instructions; Medicaid reimbursement; medical malpractice; mining law; negligence; personal jurisdiction; property law; public utilities; punitive damages; qualified immunity; retaliation for the exercise of constitutional rights; separation of powers; standing; statutory interpretation; Unfair Practices Act; venue; workers' compensation; and wrongful death.

I have filed amicus curiae briefs for clients in several cases, and have consulted with my colleagues and provided advice on numerous other appeals in which I did not enter an appearance. In addition, I have presented several continuing legal education courses on appellate practice.

In December 2016, the Judicial Nominating Commission twice found that I am qualified to serve on the Court of Appeals, but I did not receive an appointment.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22:

I have participated in three civil jury trials as a lawyer, but I did not address the jury or question witnesses. Instead, I helped the trial team to prepare for appeal and preserve issues by drafting jury instructions, motions for directed verdict, motions in limine, and trial briefs. I also attended trial proceedings to advise trial counsel on preserving error, and argued legal issues to the trial judges. By actively participating in these cases, I have learned how jury trials operate, and have gained an appreciation of how hard our jurors, trial judges, trial lawyers, and parties work on these cases.

These trials were not within the previous two years, but occurred as follows:

In October 2009, I participated in a three-week trial in *Guidance Endodontics, LLC v. Dentsply International, Inc.*, in the U.S. District Court before the Honorable James O. Browning. I helped to represent the plaintiff, a small New Mexico company, in a business torts case against a large, out-of-state dental products manufacturer.

In January 2012, I participated in a one-week trial in *Murray v. Burt*, in the U.S. District Court before the Honorable William Johnson. I helped to represent the plaintiffs in a contentious breach of contract case concerning a horse breeding business.

In December 2013, I participated in a seven-day trial in *Christopherson v. St. Vincent Hospital*, in the First Judicial District Court before the Honorable Raymond Z. Ortiz. I helped to represent the defendant in a wrongful death case involving allegations of medical negligence.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23:

As a prosecutor, I tried approximately 20 to 30 criminal misdemeanor cases in the fall of 2000, for crimes such as driving while intoxicated, simple assault, shoplifting, theft, property damage, and drug possession.

Later, in 2003 or 2004, while at a civil law firm, I assisted at a bench trial in federal district court in Philadelphia involving a dispute between our client, a local cable television provider, and Comcast.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24:

I have handled approximately 135 to 140 appeals, both civil and criminal, in both state and federal courts. Sixteen of these have been in the past two years, and nine are still pending. I also filed two amicus curiae briefs in the New Mexico Supreme Court, and one in the New Mexico Court of Appeals, during the past two years.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates	
Public Office	Dates
None.	N/A

26. Activities in professional organizations, including offices, held, for last 10 years		
Professional Organization	Position Held	Dates
New Mexico State Bar, Appellate Practice Section	<p>Board Member.</p> <p>In that capacity, I helped to organize this year's annual appellate CLE program, which will take place on September 15, 2017.</p> <p>Along with a colleague, I also gave a CLE presentation entitled "A Basic Guide to Appeals for Busy Trial Lawyers" at this year's Annual Meeting of the New Mexico State Bar.</p>	January 2016 - present
New Mexico Appellate Rules Committee	<p>Member.</p> <p>As a member of this committee, I helped to propose and draft changes to the New Mexico Rules of Appellate Procedure. In particular, I proposed a rule requiring persons who file amicus curiae briefs to disclose whether a party to the case wrote the brief or contributed money towards filing it. The purpose of this rule is to increase transparency in the appellate process. The New Mexico Supreme Court adopted this proposed rule. <i>See</i> Rule 12-320(C) NMRA.</p>	2008-2013
Defense Research Institute	<p>Social Media Chair of the Appellate Advocacy Committee for a national association of civil defense lawyers. In that capacity, I maintain a Twitter account that reports on all precedential federal appellate decisions that relate to litigation involving businesses (@DRIAppellate).</p>	2016-present.

27. Activities in civic organizations, including offices, held, for last 10 years		
Civic Organization	Position Held	Dates
New Mexico Foundation for Open Government	Board Member in organization that promotes transparency in our state government.	2015-present.
Catholic Foundation, Archdiocese of Santa Fe	Board Member. I am also a member of the Grants Committee, which awards grants to parishes and local organizations in northern and central New Mexico to help ensure that the basic human needs of poorer communities and neighborhoods are met, to assist immigrants, and to fund historic preservation efforts.	2012-present.
Knights of Columbus, Council 9340, Los Lunas, New Mexico	Member; Officer from 2008-2011. A principal activity of this organization is to help poor people in the communities of Los Lunas, Peralta, Meadow Lake, and Tome.	2007-present.
San Clemente Parish Council, Los Lunas, New Mexico	Member.	2008-2011.

28. Avocational interests and hobbies
Answer 28: Reading law, history and biography; travel; and hiking with my family (especially in the Jemez Mountains).

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.
Answer 29: [REDACTED]
30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify
Answer 30: [REDACTED]
31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.
Answer 31: [REDACTED]
32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?
Answer 32: [REDACTED]

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?
Answer 33: [REDACTED]
34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).
Answer 34: No.
35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?
Answer 35: No.
36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?
Answer 36: Not applicable, because I have never served as a judge in New Mexico.
37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?
Answer 37: Not applicable, because I have never served as a judge in New Mexico.
38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.
Answer 38: Yes.
39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.
Answer 39: No.
40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:
<p>Answer 40:</p> <p>I own a 3% interest in Sun Ranch Development Ltd. Company, a limited liability company formed by my parents and other members of my family to develop real estate in Valencia County.</p> <p>I am a shareholder/partner and director in my law firm, Modrall, Sperling, Roehl, Harris & Sisk, P.A.</p>
41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.
<p>Answer 41:</p> <p>I would recuse myself in all cases where recusal is required under the New Mexico Constitution or the New Mexico Code of Judicial Conduct. In addition, I would recuse myself from all cases in which my present law firm represents any parties for at least five years after becoming a judge, as recommended by the Advisory Committee of the Code of Judicial Conduct.</p>

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42:

Yes. The New Mexico Constitution (in Article VI, Sections 8 & 28) requires that a judge on the Court of Appeals be at least 35 years old, have engaged in the actual practice of law for at least ten years preceding the assumption of office, and have resided in New Mexico for at least three years preceding the assumption of office.

I am 45 years old, and have been in the actual practice of law for the past 17 years as of August 2017. I have resided in New Mexico since October 2004.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43:

My grandfather was a lawyer in Silver City, New Mexico when I was growing up. We talked about his cases, and I saw the positive effect that he had on the lives of his clients, whether they were individuals or small businesses. Watching him planted a seed in my mind, and made me think that I too might be a lawyer and serve the community, as he did.

After graduating from high school, I left New Mexico, and was fortunate to receive an excellent education, including two years in Spain, where I became fluent in Spanish. Upon graduating from law school, I went to work as a prosecutor in Philadelphia, but could not resist my love for my home state. I returned to New Mexico in 2004 and plan to be here forever.

I am passionate about the appellate courts, and what they represent, and that is why I have dedicated my career to appellate practice. In addition to working on appeals, I started my own website in 2012, the *New Mexico Appellate Law Blog*, to report and comment on cases, news, and important developments in New Mexico's appellate courts and in the U.S. Court of Appeals for the Tenth Circuit (the jurisdiction of which includes New Mexico).

My love for appellate practice has led me to seek to serve the people of New Mexico on the Court of Appeals. To me, an appellate court is a place where everyone is entitled to be heard, and to receive a fair decision supported by a thorough and clear explanation of the reasons for that decision.

I am well suited to contribute to the Court of Appeals because I have had extensive experience working on appellate cases; am used to working hard; enjoy working with others in a collegial way; and truly love the process of thinking and writing about the law.

At the same time, my experience as a prosecutor and as a lawyer in private practice has taught me to remember that legal disputes involve real human beings, that their resolution can have a tremendous effect on individuals, on families, and on the community as a whole. I believe that the judges who decide those questions must hear everyone with an unprejudiced, open mind. If chosen to serve on the Court of Appeals, I would strive with all my strength to fulfill that weighty responsibility.

44. Does submission of this application express your willingness to accept judicial appointment to the New Mexico Court of Appeals if your name is chosen by the Governor?

Answer 44: Yes, definitely.

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s: Paul J. Kichne Date: August 11, 2017

List of References

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Legal Writing Sample

I drafted the following motion in 2009. I estimate that my colleagues on this case were responsible for about 5% of its content.

**STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT**

VINCE G. AZUA, JULIA AZUA,
MICHAEL and MICHELE SANDERS,

Plaintiffs,

v.

No. CV-2006-07808

GIANT INDUSTRIES INC., a Delaware corporation,
GIANT INDUSTRIES ARIZONA, INC., an Arizona corporation,
et al.,

Defendants.

**MOTION FOR DISCOVERY SANCTIONS AGAINST THE GIANT DEFENDANTS
FOR FAILURE TO PRODUCE DOCUMENTS AND SPOILIATION OF EVIDENCE**

INTRODUCTION

This case involves an explosion that occurred during an attempt to repair a pump in the Alkylation Unit of Giant's Ciniza refinery near Gallup.¹ Alkylate, a highly flammable and toxic component used to create high octane gasoline, flowed through the piping, valves, and pumps in the unit. In 2000, after a single seal failure, a safety consultant warned Giant that the failure to install tandem seals on the pump could result in a catastrophic release of alkylate from this very unit. The consultants' warnings became reality on April 8, 2004, when mechanics were removing the iso-stripper pump for repair following repeated seal failures. A catastrophic release of toxic alkylate from the pump occurred, creating a vapor cloud which ignited – permanently blinding Michael Sanders and severely burning over 80% of his body, which resulted in the loss of the fingers on his dominant hand, hearing loss and disfigurement. The toxic alkylate was released because, without telling Plaintiff Michael Sanders or his co-workers,

¹ This motion collectively refers to Giant Industries, Inc. and its subsidiary Giant Industries Arizona, Inc. as "Giant." Since suit was filed, Giant Industries Inc. merged with Western Refining, Inc. and the corporations' names were changed.

Giant had modified an isolation valve in the pump's piping circuit so that refinery workers could no longer safely rely upon the position of the valve handle to ensure that the flow of alkylate was shut off--contrary to Giant's safety manual and training.

Alkylate is classified as a highly hazardous chemical under federal safety regulations. As a result, Giant is required to develop and implement a safety management program under OSHA standard 29 C.F.R. §1910.119 (2002) to prevent or minimize the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals. The federal process safety regulations (which are enforced by the New Mexico Occupational Health and Safety Bureau (OHSB)) include requirements to maintain documentation concerning the equipment pertaining to the processes used for using, storing, manufacturing, handling or the on-site movement of the alkylate and other hazardous chemicals in the Alkylation Unit. Among other things, Giant was required to document that equipment in the unit complied with recognized and generally accepted good engineering practices. *See* 29 C.F.R. §1910.119(d)(3). Equipment (like the valve involved in the explosion) which is designed and constructed in accordance with codes, standards or practices that are no longer in general use, is subject to an additional requirement that Giant determine and document that the equipment is designed, maintained, inspected, tested and operating in a safe manner. *Id.*

When Giant made changes to process equipment at the refinery, other than replacements in kind, it was required to have in place written procedures which consider the impact of the proposed change on the safety of workers and the modifications operating procedures. *See* 29 C.F.R. §1910.119(l). Employees whose job tasks will be affected by the change must be informed of, and trained in the change prior to the start-up of the affected part of the process. *Id.* The regulations also mandate the investigation of each incident which resulted in, or could

reasonably have resulted in a catastrophic release of high hazardous chemicals in the workplace within 48 hours of the incident and prepare a report which, *inter alia*, discusses the factors that contributed to the incident and recommendations resulting from the investigation. *Id.* 1910.119(m). Giant was further obligated to establish a system to promptly address and resolve the incident report findings and recommendation, document the resolutions and corrective actions and review the report with all affected personnel whose job tasks are relevant to the incident finding. *Id.* Much of the documentation that Giant was required to maintain under PSM regulations has not been produced in this case.

In addition to the documentation Giant was required by law to maintain, Giant has known since the April 8, 2004 explosion of the need to preserve documents relevant to the cause of the explosion. Indeed, in claiming that the work product doctrine applies to documents created *on the date of the explosion itself*, Giant has acknowledged that litigation was contemplated since that date. Moreover, the day after the explosion, the U.S. Chemical Safety and Hazard Investigation Board ("CSB") requested that Giant gather all maintenance/operation logs maintenance records. *See* April 9, 2004 CSB Letter (Exhibit A). Then, in 2004, 2005, and again in 2006, Giant was specifically notified by Plaintiffs' counsel of its continuing obligation to preserve these documents. *See* Letter from Clay Campbell, December 6, 2004 (Exhibit B); Letter from Max Madrid, May 2005 (Exhibit C); Letter from Earl DeBrine to Western Refining, September 1, 2006 (Exhibit D).

Despite these requests, Giant has failed to take even minimal steps to preserve several classes of evidence which would document, among other things, Plaintiff's training, any complaints or problems with the pump, valve, or valve handle, any consideration or evaluation of those complaints or problems, the repairs, changes, or modifications that were made, any

assessment or evaluation of the modifications as they related to worker safety, or any assessment or evaluation as to the need to modify safety manuals or training materials in order to protect its workers as a result of such changes. Specifically, daily log books maintained by operators which document the work performed and any incidents or problems occurring on each shift are missing. Computerized maintenance records from Giant's Maximo system are incomplete at best. And e-mail communications among Giant's management are virtually nonexistent. See Affidavit of Emily Luthy attached hereto as Exhibit E. Giant has made numerous representations to the Court and counsel for Sanders that documents responsive to Sanders' discovery requests have been produced in this case.²

Sanders' Complaint includes tort claims against Giant for strict liability for ultrahazardous activity, intentional misconduct and negligence. Because both Giant Industries, Inc. and Giant Industries Arizona, Inc. claim that benefits payable under the Workers Compensation Act are Mr. Sanders' exclusive remedy, in order to recover in tort, Mr. Sanders must establish that Giant either expected their acts or omissions to result in injury, or utterly disregarded the consequences of their acts or omissions. See *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶¶ 26-29, 131 N.M. 272. This motion seeks sanctions against Giant for failing to preserve the very documentation that is critical to not only establish what Giant knew and what they chose to do in response to that information—i.e., that it acted in utter disregard of the consequences of its acts or omissions—but also information important to Sander's claims against the other defendants.

I. GIANT HAS DESTROYED OR LOST DOCUMENTS CRITICAL TO THE SANDERS' CASE.

² See February 23, 2009 Letter from Andy Schultz ("Giant Arizona has produced all documents in its custody, possession and control that respond to Plaintiff Sanders' document requests....") and Transcript of November 7, 2008 hearing, 51:7-52:25 (confirming that all responsive documents have been produced or objected to and that "99 percent" of all responsive documents were in the document depository) collectively attached hereto as Exhibit F.

A. Giant's Managers Have Acknowledged That the Key Classes of Missing Evidence Are Critical to Giant's Knowledge and Culpability.

In recent depositions, managers of the Ciniza refinery have testified that several particular classes of evidence would be important to determine "what Giant knew" about the pump and valve involved in the explosion, including: (a) the Daily Log Books³; (b) computerized reports of work orders contained in the "Maximo" system concerning repair and maintenance work performed in the Alkylation Unit; and (c) e-mails about refinery operations and safety matters. For instance, the Safety Manager of the Ciniza Refinery at the time of the explosion, Defendant Charlie Arnold, testified that if Giant's CEO had called him after the explosion, and asked "what Giant knew" about the pump and the valve, he would have looked at the Log Books, the Maximo reports, and e-mails, among other sources, to find the answer. See Charlie Arnold Depo., 69:1-70:9 (relevant excerpts attached as Exhibit G); also Stan Fisher Depo., 51:6-52:7; 67:3-17; 41:20-42:3; 43:7-19 (relevant excerpts attached as Exhibit H).

The Log Books. As explained in the deposition testimony, the Daily Log Books and the Shifter Log Books contain a 24/7/365 shift-by-shift account of events, in which the operator of a particular part of the refinery writes down what occurred during his shift, noting any problems that occurred, and any actions taken on his watch, so that management and other refinery workers will know what is going on with that particular part of the refinery. The Log Books are to the refinery what a medical chart is to a doctor, and, just like medical records, their availability for review is critical to understanding issues within the refinery and what has been done to address them.

³ On June 10, 2009, Giant belatedly produced some of the Shift Supervisor Logs, but still has not produced the Daily Log Books or night orders. See Luthy Aff., ¶¶ 13, 16 and 20; Luthy Affidavit Exhibit E-3; and Exhibit J.

The Maximo Work Orders. Work orders are used at the Ciniza refinery to document when work on a piece of equipment is authorized and completed. The work orders identify the piece of equipment being worked on, the nature of the underlying problem, the individual performing the work, how/if the problem was resolved, etc. Review of past work orders is essential to re-creating a complete work history regarding a piece of equipment – like the iso-stripper reboiler circulation pump and the valve at issue in this case. Maximo is the name of the computerized system used by Giant to store those work orders.

E-mails. Giant witnesses testified that they used e-mail as a regular and frequent part of their job duties. Stan Fisher, Operations Manager, used e-mail to talk to shift supervisors, to discuss safety issues, to discuss operational issues, and to schedule repairs and other work to be done in the refinery. *See* Fisher Depo., 51:6–52:7. Charlie Arnold, the Safety Manager, used e-mail on a regular basis to communicate not only with Giant’s management team, but also with outside consultants. *See* Arnold Depo., 38:1-18.

Tape-Recorded Witness Interviews. Jim Stiffler, Giant’s Safety Superintendent, and the chief author of Giant’s investigation report of the explosion, testified that Giant’s investigation team interviewed witnesses, that those interviews were tape-recorded, and that a Giant official named Mark Mexal likely has those tapes. *See* Jim Stiffler Depo., May 6, 2009, at 99:7-100:24, excerpts attached as Exhibit I.

B. Giant’s Failure to Instigate a Litigation Hold Despite Its Recognition of the Likelihood of Litigation Resulted in the Destruction of Key Evidence.

There is no question that Giant has known since the April 8, 2004 explosion of the need to preserve documentation relevant to Sanders’ claims against Giant and third parties. Not only has Giant failed to preserve key classes of evidence, it has refused to even say whether a litigation hold was ever instituted, or whether back-up tapes that would have captured

electronically stored information generated on individual computers were not erased and are still in existence. See June 3, 2009 e-mail to Tom Outler, and June 11, 2009 letter to Tom Outler, attached collectively as Exhibit J.⁴ Nor has Giant provided any evidence that it instituted a litigation hold to prevent the destruction of documents or undertook any effort to preserve the Log Books, the Maximo records, and unknown numbers of e-mails.

The Log Books. Giant acknowledges that the Log Books have never been produced, but offers no explanation of their whereabouts despite their undisputed importance. Portions of those log books were provided to CSB and OHSB in connection with the post-incident investigations conducted by those agencies, yet the log books are now mysteriously missing. Thus, Giant is roughly in the same position as a doctor, who, having been placed on notice of the need to preserve the patient's medical chart for possible litigation, then unexplainably "loses" the chart.

The Maximo Work Orders. The Operations Manager of the Ciniza Refinery, Stan Fisher, recently testified that a "couple of years ago," the computer system on which the Maximo work orders were contained was upgraded and "a lot of the information was lost." See Stan Fisher Depo., 49:1-12. Apparently, Giant took no steps to prevent this destruction or to create a back-up version prior to the "upgrade," despite having repeatedly been put on notice of the need to preserve this electronically-stored information. While Giant has produced some Maximo print-outs (many of which appear to be missing descriptions of the work), it is unknown – and perhaps unknowable – just how many such reports have been destroyed forever.

E-mails. Even though both the Operations Manager and the Safety Manager testified to routinely using e-mail as a means of communicating important information about plant

⁴ Throughout this litigation, Giant's pattern and practice has been to ignore basic inquiries for information, and to force Sanders to file motions to obtain any kind of response.

operations, repairs, and safety, both testified that no one ever told them to preserve their e-mails or communicated to them that they should print out their e-mails. *See* Stan Fisher Depo., Ex. H at 52:8-53:21; *also* Charlie Arnold Depo., 37:19-25.

Other Giant personnel have also testified that no one asked them to preserve anything, and that some of the evidence has been destroyed. For example, Jim Stiffler, Giant's Safety Superintendent and chief author of the investigation report that was designed to blame Sanders for the explosion, testified that no one ever asked him to gather up or preserve documents related to his investigation of the explosion until *April of this year*, a month before his deposition. *See* Jim Stiffler Depo., May 6, 2009, 23:10-24 (Exhibit I). Prior to that, no one had ever asked him to preserve any of his e-mails related to the explosion, or preserve copies of documents related to Giant's internal investigation. *Id.*, 23:25-24:15. Mr. Stiffler acknowledged, however, that multiple e-mails were exchanged regarding the report. *Id.*, 118:9-119:12. At some point after the investigation, Stiffler's computer was replaced and, rather than preserving it, Giant sent it to the "IT boneyard." *Id.*, 116:24-118:16. Of the 332 documents included on Giant's privilege log, 5 of them were either authored by or sent to Mr. Stiffler. *See* Privilege Log, attached as Exhibit K.

Jim Clifford, Giant's Maintenance Trainer and a member of the team that produced the controversial investigation report, testified that members of the investigation team communicated quite frequently with each other by e-mail, but when asked whether he still had those e-mails, said "I got rid of them a long time ago." *See* Jim Clifford Depo., May 5, 2009, at 92:21-94:2 (Exhibit L). Clifford also testified that no one ever told him that Giant had been asked to preserve documents related to the explosion, and that no one at Giant had ever asked him to review or print his e-mails. *Id.* at 95:3-96:25. Clifford did say that someone at Giant came to him for documentation on valves in fall 2004, but that no one made any requests of him since

then; with regard to other documents about the explosion, Clifford said, "I got rid of it when I thought I needed to get rid of it." *Id.* at 95:13-18.

Danny Diaz, Giant's maintenance foreman, also testified that no one at Giant asked him to preserve any documents that might be relevant to the April 8, 2004 explosion, including e-mails or Maximo reports, or even to review them to determine whether they might have relevant information. *See* Danny Diaz Depo., May 4, 2009, at 51:20-60:9, 228:24-233:24 (Exhibit M).

Now, it is unknown, and perhaps unknowable, just how many e-mails containing information about the explosion and/or the safety and operational decisions that led up to it have been lost forever. What is clear is that Giant, having concealed information from the agencies which investigated the explosion, and utterly failed to preserve critical evidence.

Tape-Recorded Witness Interviews. Giant conducted interviews of numerous refinery workers shortly after the explosion and included summaries, which purport to reflect their statements, in its full PSM investigation report. Mr. Stiffler testified that no attorneys were present for these interviews, *see* Stiffler Depo., Ex. I at 128:15-17. Giant was obligated by federal PSM regulations to produce an investigation report, so no attorney-client or attorney work product protection applies to these tape recordings and none were listed on Giant's privilege logs. Sanders requested, in January 2008, that these materials be produced. *See* RFP No. 25 to Giant Industries Arizona, Inc., and response, attached as Exhibit N (requesting copies of any "statements" that "reveal, relate to, or concern any investigation ... of the April 8, 2004 explosion"). These tape recordings have not been produced, and Giant has not explained where they are, or whether they still exist. A year and four months have passed since the time that Giant should have produced the tape recordings, and in the absence of any explanation from

Giant about the missing tapes, the Court is justified in assuming that they, too, were "lost" or destroyed.

Giant has made numerous assertions that it has produced "all documents" responsive to Sanders' requests. *See* February 23, 2009 Letter from Andrew G. Schultz, Exhibit F. However, despite Giant's assertion that all relevant documents have been produced, Giant has continued to produce more significant documents since February 23, including:

1. The full 174-page PSM investigation report, the existence of which was concealed from Sanders, until it was finally produced on February 27, 2009.
2. The three boxes of missing bates labeled documents produced on April 16, 2009.
3. Documents from the files of Jim Stiffler, the author of Giant's PSM investigation report, which were not produced until immediately before his deposition on May 1, 2009.
4. Portions of the Shifter Log Books, which were produced on June 3, 2009, but which are still woefully incomplete⁵.

Giant, by its own admission, anticipated litigation on the date of the explosion on April 8, 2004. Giant has had over five years to gather, preserve, and produce all responsive documents. But Giant has engaged in a pattern whereby it produces some documents, then states that all documents have been produced, and then produces more critical documents, making it extremely difficult for the Sanders to prepare their case for trial.

II. THE COURT SHOULD EITHER STRIKE GIANT'S EXCLUSIVE REMEDY DEFENSE, OR AT A MINIMUM, INSTRUCT THE JURY THAT IT CAN DRAW AN ADVERSE INFERENCE AGAINST THEM FROM THE LOSS OF EVIDENCE.

Because Giant has refused to provide any explanation, it is unclear whether the failure to preserve critical evidence was intentional or merely reckless. It may be merely a remarkable coincidence that the aforementioned categories of evidence most critical to Sanders' claims

⁵ Giant has indicated that they located night orders which they are preparing for production (*see* Exhibit E-3, Letter from Tom Outler dated June 10, 2009).

subject to *Delgado* have gone missing. Maybe there is some entirely innocent explanation (though none has been proffered by Giant). Regardless, the evidence is still gone. The Sanders will likely never know the answer to this question, much as they will never know what was contained in Giant's Daily Log Books, Giant's computerized maintenance records, or Giant's e-mail communications. Although the Court need not discern Giant's mental state in connection with the inadvertent loss and/or intentional destruction of this highly critical evidence there is certainly enough here to allow a jury to find that Giant's actions were intentional and the Sanders will certainly bring this matter before the jury. In resolving this Motion, the Court need only concern itself with one question: *Who should bear the burden arising from the loss of this critical evidence?*

To ask the question is to answer it. Giant had complete control over the evidence. Giant's attorneys determined on the day of the explosion that litigation was likely. Giant received word from CSB the day after the explosion that the log books and work order records were to be preserved. Giant received word from Plaintiffs' counsel on repeated occasions in 2004, 2005, and 2006 that *all* evidence should be preserved. As noted above, Giant's own Safety Manager has testified that if Giant's CEO asked him to figure out what Giant knew about the pump and valve before the explosion, he would answer the question by looking to the Log Books, the Maximo records, and e-mails. Yet as a result of Giant's utter disregard for (or deliberate decision to ignore) multiple requests to preserve evidence, it will be near impossible for the Sanders – much less this Court or a jury – to figure out exactly what Giant *knew* about the pump and valve prior to the explosion, and what Giant *did or did not do* with respect to them.

Moreover, the tape-recorded witness interviews have not been produced, and presumably no longer exist. These interviews occurred shortly after the explosion, and were therefore taken

at a time when the witnesses' recollections of the events leading up to the explosion would have been fresh. Giant used summaries of those interviews to support the conclusions of its PSM investigation report, which was designed to blame Sanders for the explosion. Without the tape recordings neither Sanders nor the jury can evaluate whether the witness statements in the report were accurately summarized or use them to refresh recollections of events that occurred more than five years ago.

Giant should not be allowed to hide behind *Delgado's* "intentional and willful conduct" shield when their own acts led to the destruction and loss of critical evidence that would be directly relevant to proving their knowledge and intentional misconduct. Cf., *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 653, 905 P.2d 185, 193 (1995) (holding that Worker's Compensation Act does not bar employee's claim for intentional spoliation of evidence and suggesting that a claim for negligent destruction of evidence which impedes claims against third parties is also not barred by the Act, since such destruction is not a risk incident to employment). This loss of critical evidence impacts not only Sanders' claim against Giant but the other defendants as well. Had Giant maintained the documentation required by federal process safety regulations, there would be a clear paper trail regarding when the valve involved in the explosion was installed and all modifications that were made to it.⁶

The missing Log Books also implicate another aspect of *Delgado*. In that case one of the employer's egregious acts was in sending Delgado to work in a dangerous situation for which he had little to no training, even though the worker protested that he was unqualified to handle the

⁶ Giant represented to state and federal authorities who investigated the explosion that the valve was originally equipped with a gear operated wheel which was changed to a bar handle during a 1998 turnaround at the refinery. However, the documentation supporting that claim has not been produced. The OHSB concluded, "Management of Change (MOC) or a Request for Change (RFC) was not completed to address the safety considerations of changing the wheel on the valve to a handle." See page 10 of OHSB Report, attached as Exhibit O. Giant received and admitted to multiple OHSA violations following the explosion including a serious citation for violating the New Mexico Occupational Health and Safety Act for failing to address the impact of change on safety and health prior to replacing the wheel with a handle on the valve. See citation, attached as Exhibit P.

situation. *See Delgado*, 2001-NMSC-034, at ¶ 5. Here, before the explosion in the Alkylation Unit, Sanders protested to Giant management that he was not being adequately trained to work in the refinery's most dangerous area. *See Michael Sanders Depo.*, April 30, 2009, at 145:24-151:8 (Exhibit Q). In fact, Giant's post-incident investigation revealed that Giant's training department was "having trouble keeping up with employee turnover," that operators like Mike Sanders had been "moved-up too rapidly," and that "Mike Sanders may not have been fully trained and qualified." *See Interview Transcript of Paul Alonzo, Training Supervisor* [Giant p. 25365] (Exhibit R); *Interview Transcript of Charlie Arnold, Safety Manager* [Giant p-25371] (Exhibit S); and *Interview Transcript of Frank Gruda* [Giant p. 25368] (Exhibit T). But rather than provide more training to ensure Sanders' safety after he complained of the training being inadequate, Giant instead threatened to fire him. *Id.*; *also Memo from Stan Fisher to Michael Sanders*, Nov. 3, 2003 (Exhibit U). In fact, Giant intentionally glossed over the training issues, stating in its federally required root cause analysis that the investigative "Team did not find any inadequacies in the Refinery's procedures and training protocols." *See relevant excerpts from Giant's Investigative Report* [Giant p-25344] (Exhibit V).

Some of Mr. Sander's training records falsely indicate that he received training on days when he was not even present at the refinery. *See Sanders Depo.* at 161:1-164:10. Clearly, the implication is that Giant created an inaccurate paper trail suggesting that Mr. Sanders had received more training than he actually had. Giant was required to "prepare a record which contains the identity of the employee, the date of training, and the means used to verify that the employee understood the training." 29 C.F.R. § 1910.119(g)(3). It is a crime for an employer who knowingly makes any false statement, representation or certification in any record required to be maintained under the Occupational Safety Act. *See NMSA 1978, § 50-9-24(L)* (1993); 29

U.S.C. § 666(g) (1990). The missing Log Books would contain information about when he was working, and when he was not, which would corroborate his belief that Giant falsified his training records in violation of federal PSM regulations and establish one of the *Delgado* elements. *See Sanders Depo.* at 147:5-23.

Under New Mexico law, when considering what sanction to impose for the loss or destruction of evidence, the Court should consider:

(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Restaurant Mgmt. Co. v. Kidde-Fenwal, Inc., 1999-NMCA-101, ¶ 13, 127 N.M. 708. New Mexico courts have allowed judgment on liability against the spoliator even where evidence is lost through inadvertence or negligence. *See Segura v. K-Mart Corporation*, 2003-NMCA-013, 133 N.M. 192. In *Segura*, the plaintiff slipped and fell on a liquid that had leaked from a container. The store's general manager took possession of the container but at the time of the lawsuit, K-Mart could no longer locate it. The trial court found that K-Mart "knew or should have known that the container should be preserved as evidence," and, "[a]s a sanction for its failure to preserve the container, the court ruled that K-Mart would be deemed negligent and its negligence would be considered a proximate cause of Segura's injuries." *Segura*, at ¶ 3.

On appeal, K-Mart argued that the sanction was too severe because it had merely been negligent, but the Court of Appeals rejected the argument. The Court noted that even "the negligent care of evidence may have consequences as deleterious as the intentional destruction of evidence." *Id.* at ¶ 10. The Court quoted approvingly from a Mississippi decision that "requiring an innocent litigant to prove fraudulent intent on the part of the spoliator would result

in placing too onerous a burden on the aggrieved party,” and “to hold otherwise would encourage parties with weak cases to ‘inadvertently’ lose particularly damning evidence and then manufacture ‘innocent’ explanations for the loss.” *Id.* (quoting *Thomas v. Isle of Capri*, 781 So.2d 125 (Miss. 2001)). The Court said “[t]hus, in some cases, the prejudice to the victim of spoliation may weigh more heavily than the spoliator’s degree of fault in determining an appropriate sanction.” *Id.* Here, Giant’s mishandling of the evidence amounts at a minimum to gross negligence. Giant, by its own admission, knew that litigation was in the offing and had been repeatedly informed of its duty to preserve relevant evidence. But Giant’s own management-level witnesses have testified that no one even *asked* them to preserve any evidence, that they did not instruct their subordinates to preserve any evidence, and that evidence was apparently lost or destroyed.

In assessing the degree of fault the Court should also consider the difficulties Sanders has faced in obtaining discovery from Giant. Giant has twice been sanctioned for prior discovery misconduct in this case for, *inter alia*,: (1) dumping over 500,000 documents on Plaintiffs after initially claiming that the three boxes of documents previously produced contained all documents responsive to Sanders’ discovery requests; and (2) withholding 168 pages from its report on the explosion including critical portions analyzing the cause of the explosion and statements by employees. There is also evidence that Giant withheld critical information from the investigating agencies, forcing the CSB to file suit just to examine the equipment involved in the explosion (*see* Exhibit W, Order and Subpoena to Giant) and that Giant failed to inform the agencies of 2 prior fires involving that same equipment. *See* Mike Sanders Depo., 238:6-241:24; *also* compare Exhibit X, chart of alky unit incidents provided to investigators, and Exhibit Y, chart of incidents maintained by Giant employees. The Court should also consider the fact that Giant clearly is a

sophisticated litigant with sufficient resources to preserve information and manage its discovery obligations.⁷

With regard to the degree of prejudice suffered by Sanders, the detrimental effect is clear. Giant's own Safety Manager has testified that the missing Log Books, Maximo work orders, and e-mails would have been relevant to show Giant's mental state, and Sanders is required to prove what Giant's mental state was in order to establish the second element of *Delgado*. In addition, the Log Books, Maximo work reports, and e-mails, by their very nature, were designed to record all pertinent events and changes to equipment in the Alkylation Unit, and would therefore have contained evidence about what Giant chose to do, and chose not to do, in the months leading up to this explosion. The documents would provide critical evidence concerning Giant's intentional misconduct, its knowledge of problems with the Iso-Stripper unit, and its decisions not to correct a hazard that it knew was likely to cause injury to Michael Sanders. Such evidence would, therefore, be highly relevant to the first element of *Delgado*, which requires Plaintiffs to show that Giant engaged in intentional acts or omissions.

Delgado issues aside, without full access to evidence reflecting when work was performed and by whom as result of Giant's acts and omissions, it has naturally become harder for Sanders to establish its claims not only against Giant but the other Defendants. Evidence regarding the daily progress of events in the Alkylation Unit, maintenance and repairs done in the Alkylation Unit, and e-mails regarding those events, would likely show when the valve was modified and by whom. Thus, it is clear that the Sanders have been prejudiced by the loss or destruction of relevant evidence. Moreover, although Giant has had *five years* to locate and

⁷ Western Refining, Inc., which was ranked 342 on the most recent FORTUNE 500 list, reported net earnings of \$58.9 million for the first quarter of 2009, which was "one of the most profitable first quarters in the history of our company." See <http://ir.westernrefining.com/phoenix.zhtml?c=194293&p=RssLanding&cat=news&id=1284916>. Recently, a third major law firm entered an appearance on behalf of the Giant defendants.

preserve relevant documents and almost three years to produce them to Plaintiffs, it still has not done so, and continues to produce documents in drips and drabs to obstruct the Sanders' preparation of their case. Giant has compounded this problem by falsely stating that all responsive documents have been produced, when it surely knows that that is simply not true. New Mexico courts have repeatedly held that severe sanctions may be imposed against a party who makes false statements in discovery. *See Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶¶ 19-20, 129 N.M. 639 (when party misrepresents information in discovery, its case may be dismissed even where information does not go to merits of case and regardless of the ultimate importance of the information at issue); *Sandoval v. Martinez*, 109 N.M. 5, 780 P.2d 1152, 1155-56 (Ct. App. 1989) (answers to discovery that falsely deny the existence of discoverable information are worse than no response at all).

With regard to the third factor, the appropriate penalty, this Court has broad discretion, and should be guided by *Segura*, where the Court entered an order establishing as a fact that the K-Mart was negligent, and that this negligence was a cause of Segura's injuries. K-Mart argued that this sanction was too severe, and that the proper sanction should have been a spoliation inference, "which is an instruction permitting, but not requiring, the jury to infer that the missing evidence would have been unfavorable to the spoliating party." *Id.* at ¶ 13. The Court of Appeals rejected this argument, pointing out that K-Mart's actions deprived Segura of evidence needed to rebut K-Mart's defense in the case, and was not the most severe one available, which would have been a default judgment of 100% liability. Rather, K-Mart was still free to argue Segura's comparative fault under the sanction imposed.

The Court of Appeals' approach in *Segura* provides an appropriate model. Here, Giant's culpability is greater than K-Mart's, because while K-Mart lost a single leaking carton in a slip

and fall case, Giant failed to preserve all or part of three critical categories of evidence necessary to investigate a major industrial explosion case where Giant had a clear obligation to preserve the evidence, and has falsely represented that it has produced all responsive documents. By contrast, there was no indication in *Segura* that K-Mart was warned to preserve the evidence, or had engaged in a pattern of obstructing discovery, as Giant has here. Moreover, in this case, Giant recognized the possibility of litigation at the very outset and received several subsequent requests to preserve evidence, yet did nothing, and has provided no explanation for its behavior.

Thus, it would be appropriate for the Court to enter an order holding: (a) that all three *Delgado* elements have been established; and (b) that Giant was negligent, and that Giant's negligence was a proximate cause of the Sanders' injuries. As the *Segura* Court noted, this would not be the most severe sanction available, because Giant would still be free to argue the comparative fault of the other Defendants, and Sanders himself, before the jury. In addition, Giant would still be free to argue against an award of punitive damages. But the *Segura* sanction is appropriate in light of the effect that Giant's inexplicable, wholesale failure to preserve relevant evidence will have on this case.

In the alternative, Sanders respectfully requests that the Court, at a minimum, enter an order that the jury will be instructed that it may draw an adverse inference against the Giant Defendants due to their failure to preserve evidence. *See, e.g., Housing Rights Center v. Sterling*, 2005 WL 3370734 (C.D.Cal. Mar. 2, 2005)(granting an adverse inference instruction for failure to institute or communicate a proper litigation hold to preserve evidence after receiving a demand letter).

Counsel for Giant has been contacted and oppose this Motion.

CONCLUSION

This is the third time Sanders have come before the Court seeking redress for discovery problems caused by Giant. It is time for the Court to impose appropriate sanctions on Giant Industries Arizona, Inc. and Giant Industries, Inc. for their destruction of critical evidence, and Plaintiffs Michael and Michele Sanders respectfully request that the Court enter order which provides: (a) that the Sanders are deemed to have conclusively established all three elements of *Delgado* against Giant Industries, Inc. and Giant Industries Arizona, Inc.; (b) that the jury will be instructed that Giant Industries, Inc. and Giant Industries Arizona, Inc. were negligent, and that their negligence was a cause of the injuries suffered by Michael and Michele Sanders; (c) in the alternative, that an order be entered which provides that the jury will be instructed that it may draw an adverse inference against both of the Giant Defendants on all issues in the case based on their failure to preserve critical evidence; (d) that the Sanders' be awarded their attorneys' fees and costs incurred in bringing this motion, and (e) that the Giant defendants be required to pay 100% of the Special Master's fee for considering this motion.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to the following counsel of record this 17th day of June, 2009:

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August 3, 2017

Judicial Nominating Commission
UNM School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

Attention: Chair

Re: Application of Emil Kiehne for Judicial Appointment

Dear Ladies and Gentlemen:

Most respectfully yours,

Geoffrey D. Rieder



MODRALL SPERLING
LAWYERS

REC'D JUL 24 REC'D

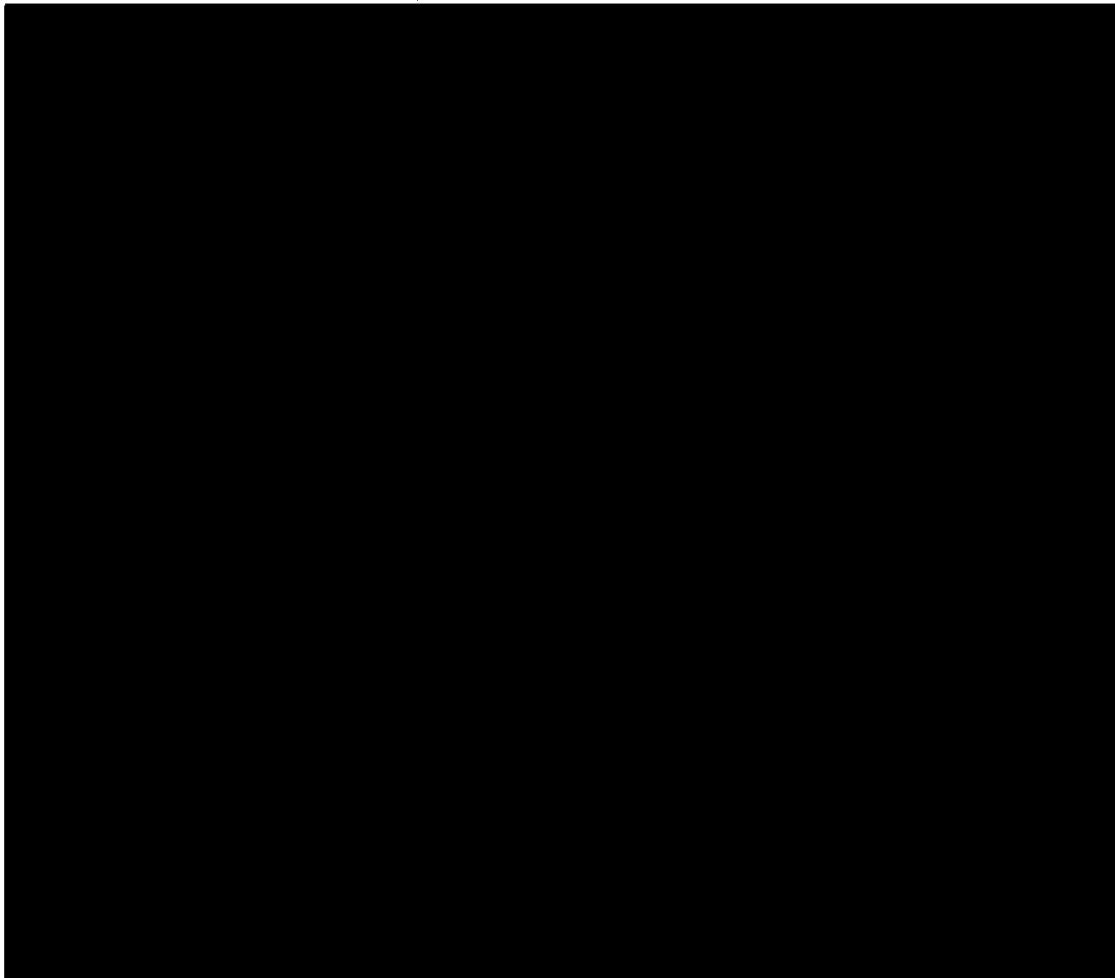
July 20, 2017

Jennifer G. Anderson
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Attn: Chair
Judicial Nominating Commission
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Re: New Mexico Court of Appeals Vacancy
Emil J. Kiehne

Dear Nominating Commission:



Modrall Sperling
Roehl Harris & Sisk P.A.

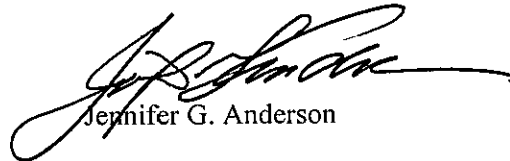
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Very Truly Yours,



Jennifer G. Anderson

JGA/nmm

JOSEPH F. BACA

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July 24, 2017

Attention Chair
Judicial Nominating Commission
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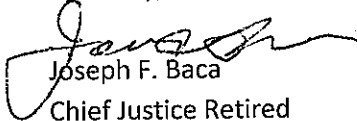
REC'D JUL 25 REC'D

Re: Emil J. Kiehne, Court of Appeals vacancy

Dear Chairman and Commission Members,



Sincerely,


Joseph F. Baca
Chief Justice Retired



GRAYSON LAW OFFICE

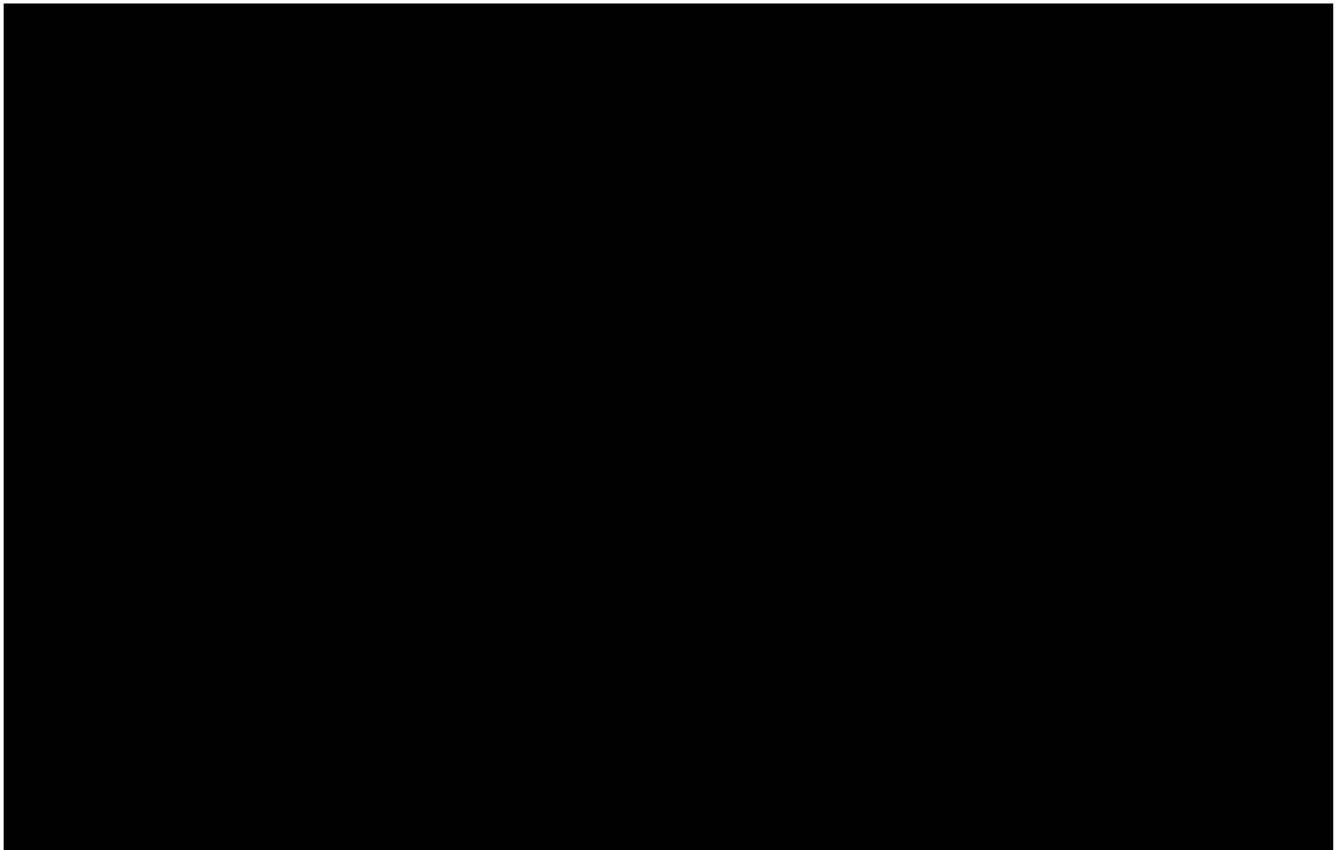
August 15, 2017

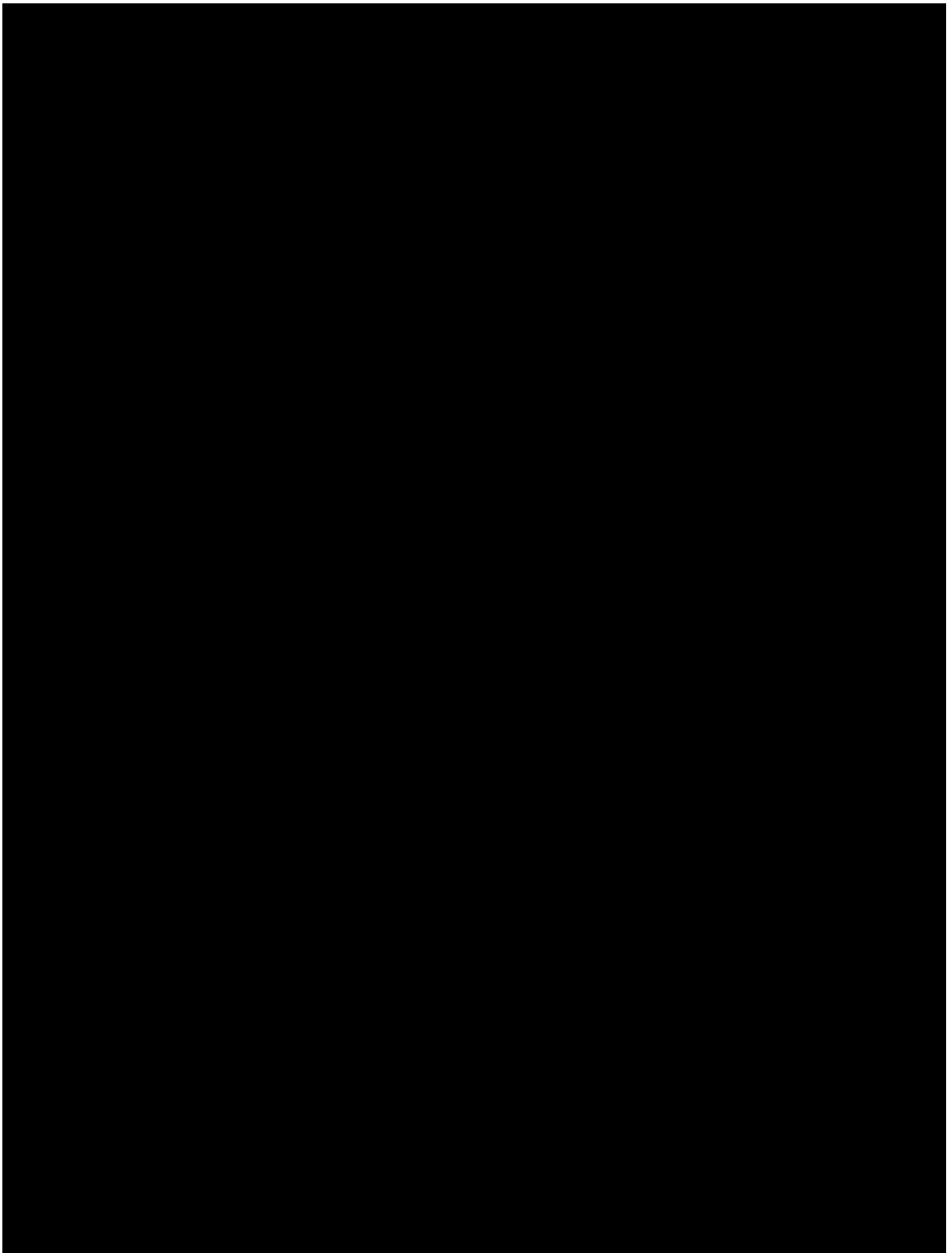
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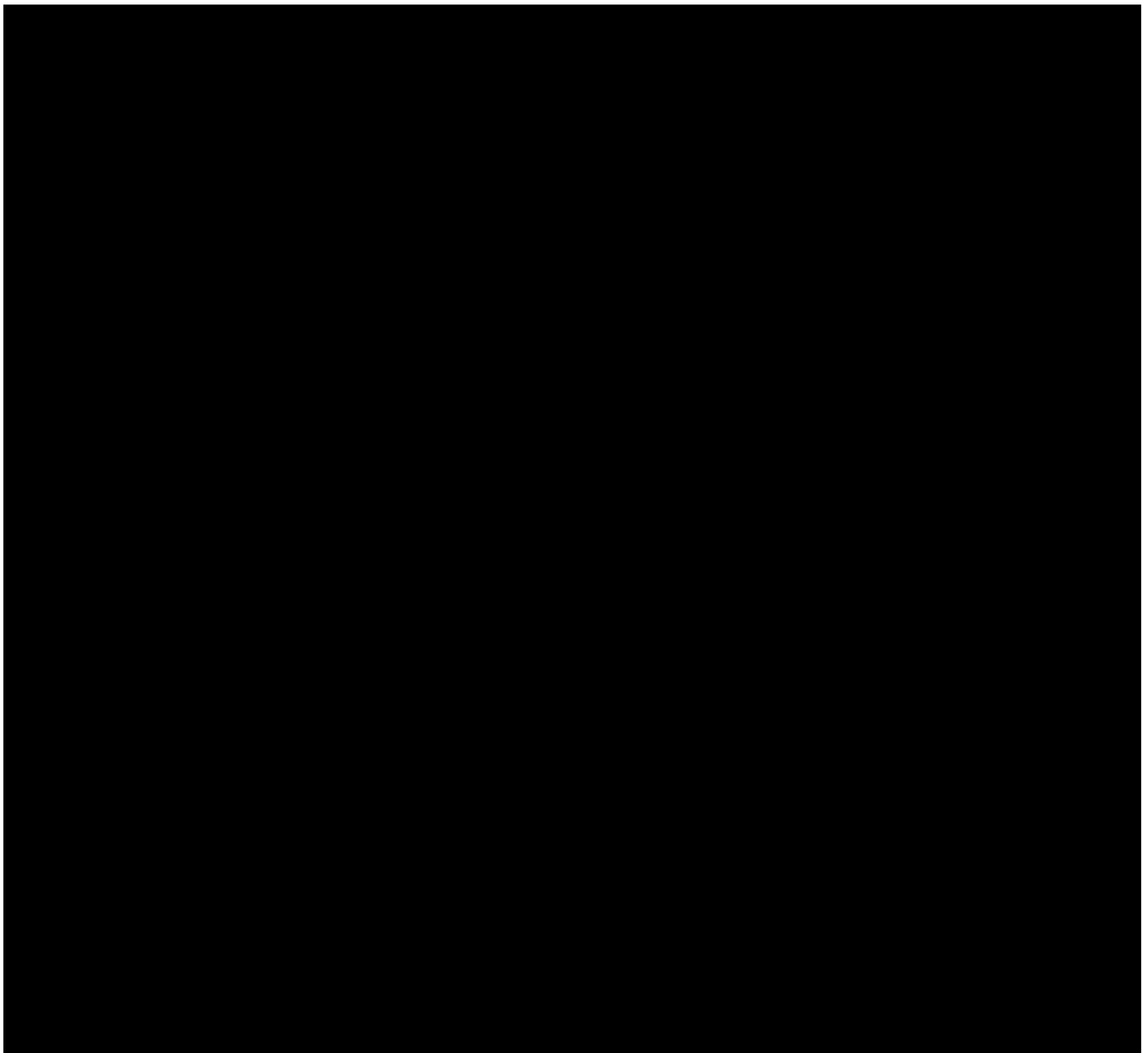
Attn: Chair
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Re: Emil Kiehne's Application for the Court of Appeals Vacancy

Dear Sir or Madam:







Very truly yours,

GRAYSON LAW OFFICE, LLC

A handwritten signature in black ink, appearing to read 'Brian G. Grayson', with a long horizontal line extending to the right.

Brian G. Grayson, Esq.

BGG/sjw